Office-Supreme Court, U.S.
FILED
JUN 20 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1828

IN THE
SUPREME COURT OF THE UNITED STATES

FALL TERM, 1984

LARRY W. RADER,

Petitioner,

v.

WISCONSIN BOARD OF ATTORNEYS
PROFESSIONAL RESPONSIBILITY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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IN THE
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WISCONSIN BOARD OF ATTORNEYS
PROFESSIONAL RESPONSIBILITY,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

STATEMENT OF THE CASE

Petitioner who was admitted to practice law in the State of Wisconsin in 1960 petitions for a Writ of Certiorari for review of the decision of the Wisconsin Supreme Court imposing discipline under Wisconsin Supreme Court

Rule (SCR) 20.22(1)(b) and (c) which provide as follows:

> SCR 20.22 — Preservation of confidences and secrets of a client. (1) Except when permitted under sub. (2), a lawyer may not knowingly:
>
> > (b) Use a confidence or secret of his or her client to the disadvantage of the client.
> >
> > (c) Use a confidence or secret of his or her client for his or her advantage or advantage of a 3rd person, unless the client consents after full disclosure.

The Wisconsin Supreme Court's decision is reported as Disciplinary Proceedings Against Rader, 121 Wis. 2d 410, 359 N.W.2d 156 (1984), (Pet. Ap. 1a-7a) and was the culmination of disciplinary proceedings originally commenced by the Board of Attorneys Professional Responsibility on November 3, 1983 alleging two counts of professional misconduct against

petitioner for allegedly revealing and using confidential and secret information for petitioner's advantage and to the disadvantage of his clients (Pet. Ap. 8a). Following a formal hearing held in accordance with the procedures specified in SCR 21.09, the referee made findings of fact (Pet. Ap. 9a-11a), conclusions of law (Pet. Ap. 11a-12a) and a recommendation for discipline (Pet. Ap. 12a). The referee also recommended that petitioner herein be ordered to pay "the costs and fees incurred in this disciplinary action." (Pet. Ap. 12a).

The referee's report was filed with the court on July 11, 1984 and an expense list was filed with the Board on July 16, 1984 (Pet. Ap. 20a).

Petitioner then appealed to the Wisconsin Supreme Court. A list of costs was filed by the Board with the court on

December 11, 1984 (Supp. Ap. 3). Briefs were filed and motions were filed by petitioner (Supp. Ap. 1, 2). On December 21, 1984 the Wisconsin Supreme Court denied the motions and ordered the license of petitioner suspended for ninety days commencing February 1, 1985 and that petitioner pay to the Board costs in the amount of $9,168.56 (Pet. Ap. 20a). Petitioner made no attempt to seek rehearing or review of the assessment of costs or of the amount of costs assessed by the supreme court. Instead petitioner filed the petition for writ of certiorari herein.

REASONS FOR DENYING THE WRIT

I. There Is No Denial Of Due Process In The Assessment Of Costs.

Petitioner contends that even though the referee can assess costs under

SCR 22.20 when an appeal is made to the Supreme Court of Wisconsin that court is bound by sec. 809.25 of the Wisconsin Statutes and that taxation of costs is done by the clerk on notice and statement of the costs. Apparently petitioner contends that a disciplinary proceeding involving an attorney licensed by the Supreme Court of Wisconsin is the same as a "civil appeal" originating in a Wisconsin trial court. Petitioner ignores the significant difference of a "civil appeal" from a trial court to the court of appeals and then to the Supreme Court of Wisconsin, which is governed by legislative enactments adopted by the legislature and governor of the State of Wisconsin, and the procedures specified by the supreme court for lawyer discipline. The latter are entirely separate as enactments of the judicial

branch of government as authorized under the Wisconsin Constitution. The supreme court may, if it choses, adopt procedures specified by the legislature but it is not obligated to do so. In this case petitioner's confusion arises from the adoption by the supreme court of SCR 22.14 which provides as follows:

> SCR 22.14 Hearing. The proceedings are to be conducted as a trial of a civil action to the court.

Thus, the Supreme Court of Wisconsin has directed that the hearing in a disciplinary matter shall be conducted as a civil trial. SCR 22.23(2) provides:

> SCR 22.23 Additional rules and procedure.
>
> (2) The rules of civil procedure apply in disciplinary proceedings except as otherwise provided in the rules.

Again, the hearing is to be conducted in accordance with the rules of

civil procedure "unless otherwise provided in the rules." Even if it could be argued that the assessment of costs falls within rules of civil procedure (which is not conceded) the court has specifically provided otherwise in SCR 22.20 which provides in part, "the board or referee in a proceeding may assess all or part of the costs of the proceeding against the respondent." As evidence of petitioner's misunderstanding as to the application of Wisconsin Statutes to the procedures adopted by the supreme court, petitioner cites Luebke v. Watertown, 230 Wis. 512, 519-22, 284 N.W. 519 (1939). There, it was held, that the clerk had no authority to assess costs without the service of a cost bill in accordance with the statute as enacted by the legislature. Luebke is not applicable to

a lawyer discipline case where supreme court rules are applied.

Since In re Cannon, 206 Wis. 374, 240 N.W. 441 (1932), it has been clear in the State of Wisconsin that the legislature may not interfere with the supreme court's authority in the area of lawyer admission and discipline including the assessment costs of a disciplinary proceeding. Cannon had been suspended from the practice of law for two years on July 5, 1929. State v. Cannon, 199 Wis. 401, 226 N.W. 385 (1929). In addition to the suspension, the court ordered Cannon to pay the costs of the proceeding in the amount of $2,699.78.

Thereafter, the legislature passed a law restoring Cannon's license to practice law and remitting the costs imposed by the court. The supreme court held the legislation invalid, not only in

its attempt to restore Cannon's license to practice law, but also in its attempt to remit the costs. The court said at 206 Wis. 411-12, 240 N.W. 441:

> While the act of the legislature purported to remit those costs, this attempt was also plainly beyond the jurisdiction of the legislature as an unwarranted interference with the judgment of this court.

The Cannon court also pointed out that the discipline function is judicial in nature and cannot be interfered with by the legislature. This court has reiterated that discipline or refusal by a state supreme court to license an attorney is a judicial act. In Re Summers, 325 U.S. 561 (1945), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

Therefore, there is no denial of due process but if petitioner was entitled to a review of the reasonableness of the

costs assessed, he has failed to demonstrate that he has availed himself of the review procedures available. He has also failed to specify in his statement of the case the stage in the state proceedings where the alleged federal questions were raised, the manner of raising and how decided by the Wisconsin court as required by Rule 21.1(h).

II. Petitioner Had A Fair Hearing Before An Impartial Decisionmaker And Court Review.

Petitioner's second position appears to be that the referee, the Wisconsin Supreme Court and the Board, when it acts as an adjudicator, cannot constitutionally impose costs of the proceeding upon the attorney being disciplined. The reasoning apparently is that the Wisconsin Supreme Court and the

Board can reduce their part of the state appropriation budget for the court by imposing fees and costs and the referee in effect determines his own fee if he finds the lawyer has been guilty of unprofessional conduct. However, there is no showing that either the supreme court budget or the referee's compensation are dependent upon costs and fees being assessed. In Cannon, the court explained the reasoning behind imposing judgments for costs at 206 Wis. 412 240 N.W. 441:

> This judgment for costs was imposed on Mr. Cannon as a part of disciplinary punishment.... The legislature can no more interfere with that punishment than it can interfere with any other judicial act, which, we have seen, is entirely beyond the scope of legislative power.

The costs in any disciplinary case are paid into the state treasury and neither the salary of the supreme court

or the fees paid to the referee are dependent upon the costs so imposed.

Petitioner contends that this case resembles Ward v. Village of Monroeville, 409 U.S. 57 (1972) where this court found the lack of due process where a mayor levied fines as a traffic judge in which he and the village each received part of the fines. It is apparent that the parallel is nonexistent. In Ward, the temptation was obvious for the mayor, sitting in a judicial capacity, to short-change defendants charged with crimes who were appearing before him. Here there is no such showing.

If petitioner's theory were carried to its logical conclusion, any assessment of costs by a court would violate due process because such assessment would reduce the budgetary requirements for the

operation of the courts and the salaries of the personnel including the judge.

Again, there is no showing in the petition that there has been compliance with Rule 21.1(h) by the recitation of the stage of the Wisconsin proceedings at which the federal question sought to be reviewed was raised and the method and manner of raising, and the way it was passed upon so as to give this court jurisdiction to review.

III. 1979 Private Reprimand Was Properly Considered By Court

Petitioner's third contention is that a 1979 private reprimand was improperly considered by the Wisconsin Supreme Court when it determined that a ninety day suspension of petitioner's license to practice law was more appropriate than the referee's recommended public reprimand.

Petitioner does not deny that he was privately reprimanded in 1979 but contends that the reprimand was considered by the court without a valid hearing and without his consent (Pet. 18). It is not clear what reasoning petitioner is using in claiming that he did not have a valid hearing on the issue of his 1979 private reprimand. The record indicates that he filed a motion with the supreme court "to have the 1979 private reprimand struck from the court's record." (Pet. Ap. 2a). In connection with the motion, petitioner also filed with the Wisconsin Supreme Court a motion to supplement the appendix in support of his motion and a motion requesting the supreme court to take judicial notice of alleged misconduct by the Board in its investigation of the 1979 matter. (Supp. Ap. 1, 2) Those motions were considered

by the Wisconsin Supreme Court and denied. (Pet. Ap. 2a). Petitioner had notice and an opportunity to be heard on his motion. There is no violation of due process and petitioner cites no authority for such claim. Even if the Wisconsin Supreme Court erred in denying the motions concerning the 1979 private reprimand, no federal constitutional due process issue is stated. Petitioner cannot retry the 1979 reprimand in this court. If he had any objections he should have voiced them in 1979.

In a disciplinary proceeding, the Wisconsin Supreme Court is free to examine petitioner's prior disciplinary record and take prior determinations into effect in assessing the proper penalty.

State v. Hildebrand, 48 Wis. 2d 73 179 N.W.2d 892 (1970), Disciplinary Proceedings Against Eisenberg, 117 Wis. 2d 332, 344 N.W.2d 169 (1984).

Accordingly, the consideration of the 1979 reprimand by the court in assessing the ninety day suspension is of no constitutional significance and is not an adequate basis for the grant of a writ of certiorari within the meaning of Rule 17.

IV. Whether Petitioner Sought $5,000 Or $3,000 In The Fee Controversy Is Not Of Constitutional Significance

Although the petition is not clear in this respect, it appears in the section of the petition entitled "Conclusion," that petitioner is contending there is a constitutional violation in the Wisconsin Supreme Court's finding that petitioner would

file his affidavits in the divorce action unless he was paid $5,000 in fees for representation of Mr. Springer. The court accepted the testimony of Attorney Lonsdorf that petitioner demanded $5,000 and subsequently reduced his demand to $1,500 (Pet. Ap. 3a-4a). Petitioner apparently contends that the Wisconsin Supreme Court ignored his affidavit that $3,000 was the amount being requested on the alleged fee controversy (Pet. Ap. 19).

Petitioner fails to cite any authority for this court to second guess the Wisconsin Supreme Court on a finding of fact made from the records made in a disciplinary proceeding.

Again, petitioner has not set out in his Statement of the Case the stage of the state proceedings in which this alleged federal question sought to be

reviewed was raised, as required by Rule 21.1(h) of the rules of this court. Where the question was not raised in the state court proceedings it is not open in the proceeding on a petition for certiorari. Ellis v. Dixon, 349 U.S. 458, reh. den. 350 U.S. 855.

CONCLUSION

Petitioner has failed to establish that the Wisconsin Supreme Court has decided an important question of federal law which has not been settled by this court or has decided a federal question in a way in conflict with applicable decisions of this court. Accordingly, the petition for the writ of certiorari should be denied.

Dated at Madison, Wisconsin this 18th day of June, 1985.

Respectfully submitted,

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IN SUPREME COURT #83-2101-D

In the matter of the disciplinary proceeding against;

Larry W. Rader

Appellant's Reply to Cross Appeal and Motion to Strike the 1979 private reprimand from the records of this Court.

Appellant moves to strike the letter of private reprimand dated November 13, 1979 because:

1. The deed was delivered pursuant to a Court Order. (App. 301)

2. Mr. Libman and his wife did not claim any interest in the property described in the deed and in fact did not answer the complaint or appear at the trial. (App. 301-302)

3. The letter was issued under an unconstitutional statutory and/or judicial procedure without a proper hearing and without right of appeal or appellate review. SCR 22.09 and 21.09.

4. The Board of Attorneys Professional Responsibility has

failed to review the wrongful conduct of Mr. Libman and his attorney, which is contrary to SCR 20.36 and 20.35, in imposing an illegal condition of not to record the deed if Karau settled his dispute with Mrs Stroick. (App. 304-305). This is a subversion of the law and contrary to SCR 20.34(3)(c) which states"

> "The civil adjudicative process is primarily designed for the settlement of disputes between parties,..."

5. Judge Keberle asked the parties to settle because of a heavy criminal intake advising he didn't know when the case would start. Karau, to avoid further delay and expense, paid Stroick her expenses of $1200 in return for a deed.

Dated 9/27/84.

Larry W. Rader
Appellant

IN SUPREME COURT #83-2101-D

In the matter of the disciplinary proceeding against;

Motion

Larry W. Rader

Appellant moves to supplement the appendix to his brief in response because the BAPR reply brief has omitted pertinent documents, and, does conceal data supporting Appellant's claim, to include the attached documents which are referenced, but not included, at pages 202 and 205 of respondent's reply brief. to wit:

Doc. #.

M. Tuchscherer letter to Price dated 7/25/79.
(underlining done by LWR)

O. Rader letter to Price dated 9/4/79. with Karau signature of joinder.

L. Rader letter to BAPR 6/15/79.

F. Rader letter to Price 3/6/79.

H. Price letter to Krueger 5/14/79.

Appellant also requests the Court further take Judicial Notice of the entire BAPR

proceeding as Appellant's request to appear before the Board was denied per the attached letter Price to Rader dated 11/30/79, THAT Price's report to the BAPR at pps 201-205 of respondent's appendix was never made available to Rader until today, October 10, 1984, and the Public interest against such close door proceedings. PRICE in this secret 1979 proceeding before the BAPR made no argument concerning the impropriety of the Libman-Tuchscherer conduct. Such ex parte proceedings are unconstitutional. Patterson v. University Board of Regents 114 Wis. 2d 495, C.A.; affirmed 119 Wis. 2d 570. S.C.

Larry W. Rader, Appellant.
P.O. Box 684, Wausau. WI 54401
715 842 5232

M E M O R A N D U M

TO: Marlene Finley
Supreme Court

FROM: Carol Kornstedt
Board of Attorneys Professional Responsibility

DATE: December 11, 1984

RE: Larry Rader

You have requested the costs incurred by our Board in the above-referenced disciplinary proceedings, and I submit the following:

Copying and Postage	$ 40.00
District 16 Expenses	42.70
Reporter Gary Davis	804.95
Reporter Sue Ann Klingforth	299.65
North Central Reporting	242.50
Counsel Dexter McKelvey	5,893.84
Referee Rodney Young	1,797.53
Stenographic work	47.39
TOTAL	$9,168.56

If you have any questions, please let me know.

:clk